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Manufacturers Alliance/MAPI
Knowledge Solutions Results·1933

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June 4, 2001

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVP)
1800 F Street, NW
Room 4035
Washington, DC 20405

Dear Ms. Duarte:

Statement in Support of Revocation of December 20, 2000 Government-Wide Regulation To Amend Coverage Pertaining to Contractor Responsibility and Labor Relations Costs (FAR Case 2001-014)

The Manufacturers Alliance/MAPI would like to comment on the proposed rule by the Federal Acquisition Regulation (FAR) Council to permanently revoke the final rule that was issued and published in the *Federal Register* on December 20, 2000 which amended coverage in FAR Parts 9, 14, 15, 31, and 52 pertaining to contractor responsibility and labor relations costs. By notice published in the *Federal Register* on April 3, 2001, pages 17758-17760, the FAR Council has proposed a reconsideration of the December 20 final rule and has asked for comments with regard to whether the Council should revoke this rule. In essence, we believe that the rule was promulgated with significant deficiencies in terms of both purpose and content and that it imposes excessive and unenforceable penalties. For these reasons, we strongly recommend that the December 20, 2000 final rule be rescinded and abandoned in its entirety. Our rationale in support of this position is detailed below.

Manufacturers Alliance/MAPI's Interest

Before we address our concerns that question the continuing validity for the December 20 rule, a brief description of our organization may be helpful. Manufacturers Alliance/MAPI is a nonprofit policy research organization whose member companies are drawn from a wide range of U.S. industries. Our membership is comprised of approximately 450 leading manufacturing companies, including ones engaged in heavy industry, aerospace, automotive, electronics, precision instruments, telecommunications, chemicals, computers, and similar high-technology industries. The Alliance conducts original research in economics, law, and management and provides professional analyses of issues critical to the economic performance of the private sector. The Alliance also acts as a national spokesperson for its member companies, concerning itself with issues that promote technological advancement and economic growth for the benefit of U.S. industry and the public interest.

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Although most of our member companies are predominantly oriented toward the commercial market, a significant number have substantial government sales, primarily to the Department of Defense (DOD), the General Services Administration (GSA), the National Aeronautics and Space Administration (NASA), and the Department of Energy (DOE), at the prime and/or subcontract level. Many of our member companies constitute the major sources for our military defensive weapons systems and global peacekeeping systems.

Accordingly, the current FAR Council's proposed rule to consider the propriety of revoking the recently adopted final rule which alters the traditional, pre-December 2000 framework by which prospective contractors are determined to be responsible or nonresponsible businesses is of significant concern to us. In addition, the extent to which the recently adopted final rule has changed the cost allowability coverage for routine and reasonable business costs associated with employer labor relations and litigation costs on the basis of newly devised, unwise reasons is likewise of significant concern to us. If the December 20 final rule is retained and allowed to take effect, in its current or previous draft versions, the amended coverage will adversely affect all of our member companies that include the government as an existing customer and those of our companies that are considering future sales of their products or services to the government.

Features of the December 20 Final Rule and General Comments

In general, FAR Part 9 speaks to "Contractor Qualifications" as a threshold entry-level determination in federal government procurement competition. The government's policy on this is clearly set forth in Subpart 9.103(a) as follows: "Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only." Subpart 9.104-1 provides a laundry list of standards by which a contracting officer is to determine whether a prospective contractor is appropriately "responsible" to do business with the government. Among other things included in this list, Subpart 9.104-1(d) states that a prospective contractor must have a satisfactory record of integrity and business ethics.

The December 20, 2000 final rule (and its predecessor draft versions[1]) sought to add, according to the FAR Council, "clarifying guidance" pertinent to Subpart 9.104-1(d) as to what constitutes a satisfactory record of integrity and business ethics on the part of a prospective contractor and how a contracting officer is to make this determination. To that point, the amendatory coverage features the following highlights:

- Contracting officers are directed to coordinate with agency legal counsel on all nonresponsibility determinations based on integrity and business ethics;
- In assessing contractor responsibility, contracting officers may consider "all relevant credible information" [not further defined], but are to give greatest weight to convictions of or civil judgments rendered against the prospective contractor within the past three years for:
  - (a) fraud or a criminal offense in connection with a public contract/subcontract;
  - (b) antitrust violations relative to submission of offers;
  - (c) embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;
  - (d) federal or state felony convictions or pending felony indictments; and
  - (e) federal court judgments in civil cases brought by the United States;
- In assessing contractor responsibility, contracting officers may consider federal administrative adjudicatory decisions, orders, or complaints issued by any federal agency, board,

[1] An initial draft of this rule was published in the *Federal Register* on July 9, 1999 for public review and comment. In reaction to the more than 1,500 sets of comments received by the FAR Council in response to that first draft, a second draft of the rule was subsequently published in the *Federal Register* on June 30, 2000 soliciting a second round of public comments. The FAR Council reported receiving more than 300 sets of comments to this second draft, after which some revisions were made and incorporated into the final version of the rule, as it was adopted by the FAR Council on December 20, 2000

or commission indicating that the contractor has been found to have violated federal tax, labor and employment, antitrust, environmental, or consumer protection laws;

- With the submission of an offer, there is a new contractor certification requirement to which an offeror/prospective contractor must certify whether within the past three years it has or has not:
  a. been convicted of any felonies (or has any felony indictment pending) arising from violations of federal tax, labor and employment, environmental, antitrust, or consumer protection laws;
  b. has any adverse court judgments in civil cases against it arising from violations of federal tax, labor and employment, environmental, antitrust, or consumer protection laws;
  c. or been found by a federal administrative law judge, federal agency, board, or commission to have violated any federal tax, labor and employment, environmental, antitrust, or consumer protection laws; and
- In coordination with the revised coverage to FAR Part 9, revisions have been adopted to the coverage in FAR Part 31, which generally addresses cost allowability. The amendatory coverage adds new provisions in this section which specifically makes unallowable costs incurred for activities that assist, promote, or deter unionization.

In statements submitted to the FAR Council by the Manufacturers Alliance/MAPI in response to earlier draft versions of the above language, we commented that such added language raises serious concerns for businesses seeking to do business with the government. The language sweeps in a host of new and ill-defined requirements which, if not met by the contractor in the unilateral judgment of a contracting officer, would operate to disqualify a contractor from government business. Inasmuch as the concepts and crux of the previously proposed coverage were incorporated into the final rule, the concerns expressed in our earlier statements continue to alarm our member companies and this organization. Constitutional due process safeguards have been ignored and executive branch rulemaking authority has been overextended in the promulgation of this final rule. Clearly, the rule must be revoked. We elaborate our specific comments below.

Specific Comments

The New, Final Regulation Is Not a Mere "Clarification" to Existing Coverage

In preamble language to the December 20 final rule, the FAR Council explains that the additional guidance to amend FAR Part 9 and related provisions in FAR Parts 14, 15, and 52 is a final rule "***clarifying*** what constitutes a 'satisfactory record of integrity and business ethics' in making contractor responsibility determinations."[2] [Emphasis added] That simply is not the case.

Under the new rule, the authority of government contracting officers is greatly expanded to allow them to make unilateral determinations of "nonresponsibility" about prospective contractors on the basis of "relevant credible information" that a contractor has, within the past three years, violated various labor, employment, environmental, antitrust, or consumer protection laws. Little attention is given to the magnitude or relevance that a particular violation of any of these laws might have on a contractor's prospective performance for supplies or services to be procured by the government. Such guidance that is given is both confusing and vague. A single violation of law, according to explanatory language with the rule, will not "normally" give rise to a determination of nonresponsibility, although it could do so in certain unspecified circumstances. Generally, however, a contracting officer is advised in the rule to focus on "repeated, pervasive, or significant" violations of law in reaching a determination of nonresponsibility. Again, though, the magnitude or relevance of any such violation to the intended contract work product is not expressly taken into account and these

[2] *Federal Register*, December 20, 2000, p. 80256.

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aspects are left to the discretionary judgment of the contracting officer. This opens the door to abuse of discretion in making such judgments about a prospective contractor's responsibility.

Perhaps even more disturbing in the final rule is that what constitutes a "violation" on the basis of "relevant credible information" is open to broad interpretation and subjective judgment. At the outset, the rule initially defines "violations" as adverse judicial adjudications against a business for noncompliance of federal or state labor, employment, etc., laws. But later in its text, the rule expands the meaning of a violation so broadly as to include indictments and complaints or claims filed before courts, agencies, boards, and commissions.

Consequently, under the new regulatory coverage, if retained, ***mere allegations*** can constitute the basis of a nonresponsibility determination. Under our system of law, mere allegations do not constitute actual wrongdoing. Hence, this aspect of the rule is clearly excessive. Moreover, even in the case of convictions and adverse judgments, the rule fails to take into account a party's right of appeal. Equally egregious, the final rule, as promulgated, sweeps into its coverage a prospective contractor's record of compliance with foreign laws and regulations (to include labor, employment, environmental, antitrust, and consumer laws) within the bounds of consideration for a nonresponsibility assessment. No allowance is made for unintended errors that may render a company noncompliant. Nor is there any differentiation for unsubstantiated claims of noncompliance made by, for example, disgruntled employees against their management. All of these features of the rule place prospective contractors at unacceptably greater risk of being denied future government contract opportunities.

The additional guidance unjustifiably imposes a new contractor certification that requires a company to certify in a contract proposal that neither the company, nor any of its principals, has violated, within the past three years, any labor, employment, environmental, antitrust, or consumer protection laws. Unlike the first two draft versions, the FAR Council did narrow the meaning of the term "violation," as it applies to the certification only, to include: (a) a federal or state felony conviction or indictment; (b) an adverse federal court judgment against a contractor brought by the United States; or (c) an adverse decision by a federal administrative law judge, board, or commission against a contractor finding a willful violation of law. Even with these limitations, the additional requirement imposes a sizable new data collection burden on contractors. This is especially true for large businesses with multiple, scattered, business locations. This new contractor certification requirement will, most likely, only serve to increase penalties assessed against a contractor if the certification is ultimately proved untrue—even for unintentional mistakes.

By terming the proposed rule to be "clarifying" language, there is a sense that the FAR Council sought to avoid having to conduct a cost-benefit analysis or otherwise evaluate the substantive and economic impacts that this new rule might have on agencies and businesses alike, in accordance with Executive Order 12866, "Regulatory Planning and Review" (September 30, 1993). Had it conducted such a cost-benefit analysis, the FAR Council would have had to justify economically that the costs and burdens to contractors imposed by the new rule are warranted—a point of fact that we believe it cannot ultimately demonstrate. This basis alone warrants a complete rescission of the rule.

Lack of Due Process Safeguards

The December 20 final rule, as adopted, greatly and unduly expands the framework within which a contractor may be determined to be nonresponsible. It also is unlawful in that fundamental rights of due process are not afforded to contractors accused of noncompliant actions. We are particularly concerned with the permissive language that allows contracting officers to make findings of nonresponsibility on the basis of federal administrative adjudicatory decisions, orders, or complaints issued by any federal agency, board, or commission indicating that a contractor has been found to have violated federal tax, labor and employment, antitrust, or consumer protection laws. Additionally, we are concerned that a contractor may be determined to be nonresponsible on the basis of pending indictments. As we stated earlier, under our system of law, mere allegations do not

constitute actual wrongdoing. And, even in the case of recorded convictions and adverse judgments, the FAR Council has failed to take into account the import of formal appeals.

Presently, contractors already must comply with labor laws, employment laws, environmental laws, antitrust laws, and consumer protection laws and they must affirmatively demonstrate that they have, in good faith, complied with such laws. Absent this, contractors are subject to enforcement actions by the government and penalties that the Congress has provided separately with each of these substantive laws. Moreover, any of these enforcement actions are undertaken with judicial and/or administrative due process safeguards that ensure that the accused wrongdoer is provided a fair opportunity to be heard. Convictions, or adverse decisions, against contractors for noncompliance with any of these laws are reportable to procurement agencies. Further, such convictions or determinations can lead to a suspension or debarment proceeding against a contractor which, if supported, can further establish a contractor's ineligibility for future government business for certain periods of time. Even so, suspension and debarment proceedings must include certain due process safeguards to ensure that the accused contractor has a fair opportunity to be heard. The December 20 final rule ignores these fundamental rights.

Improper Exercise of Executive Branch Rulemaking Authority

Procurement contracting officers are trained and highly skilled in negotiations of contractual terms and conditions and in the administration of contracts. Unquestionably, they have the necessary expertise to determine initially whether a contractor is performing adequately on a given contract, but even this determination is subject to further administrative or judicial review. It is specious to presume that such contracting officers have the requisite skills to determine whether a contractor is in noncompliance with the myriad of technical requirements associated with tax, environmental, labor, antitrust, consumer protection, or any of another host of laws. Such personnel should not and cannot be empowered with adjudicative authority.

The December 20 final rule adds new, unilateral and improper adjudicative authority to contracting officers. This is beyond a contracting officer's expertise and is most certainly beyond the jurisdiction of the FAR Council to extend. This expansion of authority to a procurement contracting officer is an improper exercise of executive branch rulemaking authority, and more properly lies within the legislative authority of the Congress. Had the Congress wanted to give a procurement contracting officer authority to make determinations of violations of law against contractors, it could have done so. But, the Congress has not taken such action. And, this defect is not cured by adding language in the regulatory coverage that directs contracting officers to coordinate with agency legal counsel on nonresponsibility determinations based upon integrity and business ethics. This does not alter the inappropriateness of the entire scenario.

New Coverage on Cost Allowability Re: Labor Relations

In tandem with the revised coverage to FAR Part 9, revisions have been adopted to the coverage in FAR Part 31, which generally addresses cost allowability. The amendatory coverage added new provisions in this section which specifically makes unallowable costs incurred for activities that assist, promote, or deter unionization. Specifically, the final rule added a new provision (b) to FAR Subpart 31.205-21, "Labor relations costs," which makes costs incurred for activities related to influencing employees' decisions regarding unionization unallowable. The rationale offered for this cost principle change is that it is "in furtherance of the Government's long-standing policy to remain neutral with respect to employer-employee labor disputes."

We believe that reasonable business costs should continue to be allowable wherever appropriate and, in this case, contractor costs incurred for activities related to influencing employees' decisions regarding unionization should generally continue to be allowable costs. To unilaterally and summarily reverse this practice will inevitably result in an adverse effect on both management and employees regarding unionization discussions and risk cutting off legitimate channels of information

to employees provided by the contractor concerning unionization. As adopted, the new regulatory coverage is imprecise, overly broad in scope, and is adverse to legitimate business management interests.

Conclusion

For the reasons presented above, we believe that the December 20, 2000 government-wide final rule which amended FAR Parts 9, 14, 15, 31, and 52 pertaining to contractor responsibility and employer-employee labor relations costs are significantly deficient in terms of both purpose and content. Specifically, we believe the final regulation is not a mere clarification but constitutes a major rule that requires an economic cost-benefit assessment as to the impact that it will effect on agencies and businesses alike that justifies its adoption. Even more fundamental, we believe the regulation fails to recognize and incorporate constitutional due process standards and represents an improper exercise of executive branch rulemaking authority. Further, we believe that the new coverage which makes costs incurred for activities related to influencing employees' decisions regarding unionization unallowable is imprecise, overly broad in scope, and adverse to legitimate business management interests. On any and all of these bases, we urge the FAR Council to revoke the December 20, 2000 final rule in its entirety. To otherwise retain this coverage places contractors at risk of being excluded from future government business for questionable or alleged violations of laws and regulations, of whatever magnitude, and irrespective of any relevance to the type of work for which the government is soliciting offers or bids. Again, we recommend that the final rule be rescinded.

Thank you for the opportunity to present our comments and views in this matter. If we can be of further assistance, please let us know.

Sincerely,

Thomas J. Duesterberg

Thomas J. Duesterberg
President and Chief Executive Officer